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In The

Supreme Court of the United States

October Term, 1993

NORDELL INTERNATIONAL RESOURCES, LTD.,

Petitioner,

v.

TRITON INDONESIA, INC., TRITON ENERGY CORPORATION, and TRITON OIL (NZ) LIMITED,

Respondents.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

BLECHER & COLLINS, P.C.
MAXWELL M. BLECHER
RALPH C. HOFER
[Counsel of Record]
611 West Sixth Street
Suite 2000
Los Angeles, California 90017
(213) 622-4222

Attorneys for Petitioner
Nordell International Resources, Ltd.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

The questions presented by this petition for certiorari are:

1. Can an arbitration panel make an award which ignores confessions of fraud and other illegalities made on the record and affirm an arbitration award based on such conduct even though such illegal conduct violates specifically articulated public policies against fraud and corruption?

2. Can an arbitration panel make an award which provides affirmative relief to a party who on the record admits it committed fraud and other illegal conduct and thereby completely disregard the unclean hands doctrine which prohibits a party from benefitting from its own wrongful conduct?

PARTIES AND RULE 29.1 STATEMENT

All parties to this proceeding appear on the caption of this Petition.

Pursuant to Supreme Court Rule 29.1, the Petitioner submits the following information:

Nordell International Resources, Ltd. is a wholly owned subsidiary of Veronex Resources, Ltd., now known as International Veronex Resources, Ltd. ("Veronex").

Triton Energy Corporation owns 100% of Triton Indonesia, Inc. and Triton Energy Corporation owns 63.7% of New Zealand Petroleum Co., Ltd., successor-in-interest to Triton Oil (NZ) Limited.

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PETITION FOR WRIT OF CERTIORARI

Petitioner NORDELL INTERNATIONAL RESOURCES, LTD. ("Nordell") respectfully requests that a writ of certiorari be issued to review the judgment and decision of the Court of Appeals for the Ninth Circuit filed on July 23, 1993.

OPINION BELOW

The Opinion of the Ninth Circuit is a non-published memorandum decision. It is reprinted at Appendix A, APP-1.[1]

JURISDICTIONAL STATEMENT

The Court of Appeals for the Ninth Circuit entered its judgment on July 23, 1993. The Ninth Circuit denied Nordell's timely petition for rehearing and suggestion for rehearing *en banc* on September 21, 1993. A copy of that Order is reprinted at Appendix E. This Petition is timely filed within ninety (90) days of that Order. Jurisdiction of this Court is premised on 28 U.S.C. § 1254(1) and 9 U.S.C. §§ 16(a)(1)(D)-(E), 16(a)(3).

STATUTORY PROVISION INVOLVED

Section 10 of the Arbitration Act (9 U.S.C. § 10(a)(4)) provides in pertinent part:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –

[1] References to documents included in the Appendix hereinafter will be referred to as "Appendix ___" and specific page references will be cited as "APP-___."

* * *

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

* * *

STATEMENT OF THE CASE

A. Summary Overview

Petitioner Nordell entered into a Farmout Agreement and Joint Operating Agreement ("JOA")[2] in October 1988 with Respondent Triton Indonesia, Inc. ("TII") for the joint operation and development of a large producing oil field in Indonesia known as the Enim Field. (ER 114, Exhs. A and B.)[3] Respondent Triton Energy Corporation ("Triton") was TII's parent and guaranteed TII's obligations under the Farmout Agreement and the JOA.

In January 1990, Nordell filed for arbitration with TII, Triton and Triton Oil New Zealand Limited ("TONZ") regarding Nordell's claims that TII, Triton and TONZ (sometimes hereinafter referred to collectively as "the Triton Companies") breached their obligations under the Agreements regarding the issuance of cash calls against

---

[2] The Farmout Agreement and the JOA will sometimes hereinafter be referred to collectively as "the Agreements."

[3] *Citations to Record below not included in Appendix*: "CR" refers to items on the District Court's Docket Sheet which were not included in the Excerpts of Record filed with the Court of Appeal. "ER" refers to items included in the Excerpts and corresponds to item numbers on the District Court's Docket Sheet.

Nordell for the operation of the Enim Field.[4] (ER 115, Exh. T at 18-26.) The arbitration panel presided over the arbitration in October 1990 and issued an award adverse to Nordell in December 1990. (Appendix B, APP-25-30.)

The arbitration panel's award divested Nordell of its $32 million investment in the Enim Field which accumulated over a six year period. The award also ordered Nordell to pay TII approximately $1.0 million for cash calls and damages Nordell allegedly owed the Triton Companies. (Appendix B, APP-27-28.) The arbitration panel also ignored evidence which indicated that TII's accounting methods for the Enim Field joint venture were riddled with fraud and suffered from a complete lack of internal accounting controls. (Appendix B.) Despite unrefuted evidence Nordell presented at the arbitration proceedings of fraudulent accounting practices, violations of the Foreign Corrupt Practices Act and federal securities laws, the panel issued its award based on figures which had their origin in Triton's fraudulent accounting records and clearly illegal conduct.

B. Factual Overview: The Nature Of The Business Dispute Between Nordell And Triton

Effective October 1, 1988, Nordell entered into a contract with TII, the newly created wholly owned subsidiary of Triton. The contract consisted of two integrally related agreements – the Farmout Agreement and the

---

[4] Both Nordell and TII were required to make certain cash contributions, known under the Agreements as "cash calls," toward the ongoing operation of the Enim Field.

JOA. Triton guaranteed TII's performance on the Agreements. *Id.*

Pursuant to the Agreements, TII was to have infused substantial new capital into the Enim Field Project (sometimes hereinafter referred to as the "Project"), an oil production field located on the island of Sumatra in Indonesia. TII was obligated in the first instance to invest a total of $24 million in cash: $21 million into the Enim Field Project directly and a $3 million payment to Nordell. TII became the operator of the Project with full responsibility for the technical, operational, managerial, financial and accounting aspects of the Project after Triton obtained approval in late November 1988 of Pertamina, the state-owned oil company of Indonesia. (ER 114, Exhs. A and B.)

During the period that TII was making its initial cash investment in the Enim Field Project of $21 million, Nordell was not required to contribute to the costs of the Project. Once TII had completed making its initial cash investment into the Project, TII was to pay 60% and Nordell was to pay 40% of all the future costs of the Project. Revenues were also to be allocated between Nordell and TII on the basis of their respective participating interests. (ER 114, Exh. A, Article 8 at 33-35, Article 10 at 35-36.)

In both the Farmout Agreement and the JOA, the obligation of TII to pay 60% and of Nordell to pay 40% of all the costs and expenses of the Project was explicitly stated in Paragraph 7.4 of the Farmout Agreement and Paragraph 2(c) of the Accounting Procedure Annex to the JOA. (Exh. 114, Exh. A at 33; Exh. B at 87.)

During 1989, Nordell disputed several accounting practices of TII, complaining that the effect of these accounting practices was to credit TII with satisfying its requirement to make the initial cash investment of $21 million in the Project *before* TII had actually contributed that amount in cash. (CR 114.)

On November 24, 1989, TII declared that it had made its required initial cash investment of $21 million in the Project. (CR 6, Exh. I.) TII then made its first demand on Nordell for an additional cash contribution to cover Project expenses. Nordell paid under protest and, on January 30, 1990, demanded arbitration with Triton. (CR 114 ¶¶ 16-19; ER 115, Exh. T at 18-26.)

The evidence at the arbitration focused on the issue of "cash calls" and which party owed money to the other on the cash calls. The arbitration panel concluded that Nordell owed Triton money on the cash calls.

C. Factual Overview: The Nature Of Triton's Fraudulent And Illegal Conduct

In the course of the actual testimony received during the arbitration proceedings, the panel heard testimony from various Triton and TII employees about TII's fraudulent accounting practices. This testimony came from Triton and TII employees or ex-employees involved in internal audit and financial reporting, including high level financial reporting executives Michael Calloway and Richard Poulton. Another TII financial reporting officer, R.P. Murphy, also testified about fraudulent accounting practices. Other TII employees who participated in

fraudulent accounting practices were J.B. McDonough and R.L. McAdoo.

These fraudulent accounting practices were outlined in detail in a report Calloway did on an internal audit review dated September 25, 1989 (the "Calloway Report"), which Calloway completed in September 1989, one year before the arbitration began in early October 1990. (Appendix F.) The Calloway Report surfaced during the arbitration. Calloway was from Triton's headquarters in Dallas, Texas and had been dispatched to the Enim Field Project in Indonesia for an accounting review.

The Calloway Report revealed that TII was routinely paying bribes in Indonesia. (Appendix F, APP-44.) More significantly, the Calloway Report revealed that TII had paid Indonesian government auditors $200,000 to reduce the audit "exceptions" for the Project. *Id.* Calloway also wrote in his report that the accounting back-up functions at TII are so inadequately documented that "it is very difficult, perhaps impossible, to tell a real transaction from one that has been faked for cost recovery purposes." *Id.* The Calloway Report also stated that other U.S. oil companies, such as ARCO, had also paid bribes in Indonesia resulting in internal audit control problems. (Appendix F, APP-45.)

Calloway in turn testified during the arbitration that such bribes had in fact been paid by Triton to get the Indonesian government auditors to alter their audit report of the Project. (Appendix G, APP-54.) Calloway testified that TII in Indonesia prepared fraudulent invoices and included them to "pad" the cash calls on Nordell as items which were cost recoverable. (Appendix

G, APP-56-57.) "Cost recoverable" items were expenses that TII could charge to Nordell's cash call obligation, and in this manner Triton "padded" cash obligations to Nordell thereby accelerating Triton's ability to begin the "cash call" period and reducing Triton's own cash obligations.

The pragmatic effect on Nordell of Triton's illegal and fraudulent accounting practices was to: (1) greatly reduce Triton's cash obligations; (2) greatly increase Nordell's cash obligations; (3) substantially reduce the time period for which Triton had to pay its 100% cash obligation for the Project expenses; and (4) substantially accelerate the time period for which Nordell became obligated to pay its 40% share of the Project expenses. Absolutely none of these effects that resulted from Triton's illegal and corrupt activities was of any benefit whatsoever to Nordell.

As a further part of such fraudulent accounting practices, TII created an "inventory in transit" account. Internal auditor Poulton testified about this account. (Appendix H, APP-85-93.) The account was for inventory that TII allegedly purchased for the Project, but the equipment never actually reached the Project. However, TII was booking the alleged purchase cost to the Nordell/TII joint cost recovery account in direct violation of the JOA which required the cash method of accounting, not the accrual method.

When Poulton raised concerns to TII about this "inventory in transit" account, he was told not to worry

because TII in Indonesia could "buy the audit." (Appendix H, APP-93-94.) Poulton resigned because he recognized the criminal nature of these transactions. (Appendix H, APP-93-95.) Poulton, in connection with his resignation, filed a statement with the American Embassy in Indonesia in order to protect his professional reputation as an accountant.

Triton asked Poulton to sign a letter regarding his audits in connection with his resignation. (ER 29 at 702.) Poulton refused to sign TII's resignation statement and testified as follows:

> When the letter [from TII] was provided to me on 2 May, you know, considering that I had viewed that there were potentially illegal transactions, there were the elements of what I viewed as possibly a fraudulent treatment of an area where I had worked, I had serious reservations about signing any sort of a representation for Triton.

Id.

Project comptroller Murphy also had a concern about potential criminal exposure in his financial reporting work at TII. (ER 29 at 541-42.) Murphy also cited several accounting "errors" which had worked in Triton's favor and against Nordell. (ER 29 at 610-11.) Also, Nordell's own internal auditor, Paul Maupin, was not allowed access by Triton to financial and accounting records while he was in Indonesia attempting to conduct an audit. (ER 29 at 872-75, 898-99.)

Finally, Triton's accounting fraud was actually proven in court in Texas in a wrongful termination case

brought by Triton's former chief accounting officer, Jimmy Janacek. (Request for Judicial Notice, Exh. 1.)[5] The jury's special verdict form indicates that Triton terminated Janacek because he refused to sign a 10-K disclosure statement which contained material misrepresentations and omissions concerning Triton's financial affairs and because he refused to participate in circumventing internal company audit controls. The jury returned its verdict in favor of Janacek in June 1992 and awarded $124 million in damages against Triton.

D. The Proceedings Below

On January 30, 1990, Nordell filed a demand for arbitration against the Triton Companies. (ER 115, Exh. T at 18-26.) On April 9, 1990, the Triton Companies filed a counterclaim demand against Nordell for arbitration. (ER 115, Exh. U at 27-31.)

In October 1990, the arbitrators conducted the arbitration hearings in Singapore and Los Angeles, California. On December 13, 1990, the arbitrators issued their award. On December 26, 1990, Nordell filed its motion in the District Court to vacate the award. On January 18, 1991, the Triton Companies filed its motion in the District Court to affirm the arbitrators' award against Nordell.

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[5] Nordell filed a request for judicial notice with the Court of Appeals requesting the court to take judicial notice of the complaint in Janacek's wrongful termination lawsuit against Triton and the jury's special verdict form wherein the jury found in favor of Janacek and awarded him $124 million in damages against Triton.

On February 6, 1991, the District Court issued its order staying the award and remanding the matter back to the arbitrators for clarification and further hearings. (Appendix D.) On June 18, and July 12, 1991, the arbitrators conducted further proceedings and hearings in Los Angeles.

On August 30, 1991, the arbitrators issued an order confirming and clarifying their original award. (Appendix B, attached Exh., APP-31-33.) On September 9, 1991, Nordell filed an application for correction. On September 30, 1991, the application was rejected by the arbitrators. (ER 115, Exh. GG at 76.) On November 25, 1991, the District Court issued an order confirming the arbitrators' award. (Appendix C.) On February 25, 1992, the District Court entered final judgment on the arbitrators' award. (Appendix B.)

On March 27, 1992, Nordell filed a timely notice of appeal. (ER 185; ER 186.) On July 23, 1993, the Court of Appeals affirmed the award as to Nordell, but reversed the award as to Nordell's parent company, Veronex. (Appendix A.) On September 21, 1993, the Court of Appeals denied Nordell's Request for a Rehearing. (Appendix E.)

E. The Opinion Of The Ninth Circuit

The Opinion discusses the fraud issue in a blithe fashion, completely disregarding Triton's outright confession of accounting fraud and violations of the Foreign Corrupt Practices Act. (Appendix A, APP-9.) The Opinion mischaracterizes the nature of the factual dispute on this

issue. *Id.* Triton actually admitted the fraud, but argued that the fraud and foreign bribes were not pervasive enough to be "significant." Alternatively, Triton argued that even if Triton's accounting fraud and payment of bribes was widespread, Nordell, as a joint venturer in the Project, directly benefitted from the fraudulent accounting methods and illegal bribes Triton was paying to Indonesian officials and hence had no standing to object to it.

The Opinion incorrectly focuses on the concept of an alleged factual dispute regarding the fraudulent financial data and violations of the Foreign Corrupt Practices Act. In reality, all Nordell was doing was asking the Court of Appeals to recognize and address the accounting fraud and violations of the Foreign Corrupt Practices Act which were admitted by Triton's employees or ex-employees. It is not a matter of changing these factual findings but rather giving the proper legal import to Triton's admitted violations of the law.

Triton cannot change these admissions by offering evidence from other employees that the financial data was otherwise reliable; to do so would allow the admitted wrongdoer, Triton, to escape any consequences for its actions. Such a circumstance is the precise reason for the existence of the "unclean hands" doctrine. The Opinion conveniently and completely sidesteps the "unclean hands" issue by claiming that it became irrelevant because the arbitrators allegedly made an implicit factual finding that no accounting fraud or illegal foreign bribes occurred. (Appendix A, APP-11.)

The proper issue is the appropriate legal consequences of Triton's admissions of illegal conduct directly

related to the issue central to the arbitration: the financial status of the Enim Field Oil Project. These admissions evidence illegal conduct which is directly contrary to specific public policies making foreign bribes illegal (the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 and 78dd-2), making fraud illegal (Cal. Civ. Code §§ 1572, 1573, 1709 and 1710), and making securities fraud illegal (15 U.S.C. §§ 77k and 78j(b)). In short, the Opinion begs the question and ducks the issue. This Court should grant this Petition to correct these errors.

REASONS FOR GRANTING THE WRIT

The reasons for granting the writ stem from the disturbing trend demonstrated in the case law that arbitrators, once legitimately impanelled pursuant to a contract or agreement between the parties, and assuming no "bias" on the part of the arbitrators, in essence have unlimited powers to reach a decision and assess the law and the evidence. In the instant case, the arbitrators ignored, disregarded and indeed disparaged evidence of Triton's criminal wrongdoing as presented in the form of admissions by Triton's own employees or ex-employees. In these circumstances, the arbitrators are obligated to safeguard the public's interest in protecting the integrity of the judicial process as manifested in the Nordell/Triton arbitration proceedings by ensuring that Triton did not benefit from its own admitted wrongdoing.

The only way to ensure that arbitrators are not "above the law" is to allow court intervention in limited circumstances such as in the instant case where to enforce

the award would be contrary to public policy due to the obvious violations of federal securities laws. Such violations are evident from Triton's conduct which reveals, based on its own confessions of wrongdoing, that it violated the Foreign Corrupt Practices Act and federal securities laws stemming from its failure to disclose in its registration statements the Calloway Report, and the illegal bribes to Indonesian officials.

However, the arbitrators, apparently so bent on obtaining the "right result," ignored these violations of federal law, contributed to a "cover up" of the violations by ordering the Calloway Report and Calloway's testimony sealed, and then, incredibly, actually based their award on the fraudulent accounting data that was the subject of the violations of federal securities laws.

This Court has held that no arbitration award which violates a specifically articulated public policy is enforceable. *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 32, 108 S. Ct. 364 (1987); *W.R. Grace and Co. v. Local Union 759*, 461 U.S. 766, 103 S. Ct. 2177 (1983). Hence, the arbitrators are not above the law in fashioning their award but rather they are subservient to the basic legal concept that no award may violate public policy. The Ninth Circuit in its Opinion completely ignored the dictates of this Court's instruction in *Misco* and *W.R. Grace and Co.* This Court should grant this petition to demonstrate that an arbitration award which violates public policy cannot stand.

A. The Decision Below Is in Conflict with This Court's Decisions in *W.R. Grace and Co.* and *Misco*

1. The Rationale Of The *W.R. Grace and Co.* and *Misco* Decisions

In *W.R. Grace and Co.*, a company sought relief from an arbitration award rendered under a collective bargaining labor agreement. 462 U.S. at 762-64. W.R. Grace and Co. was seeking relief from an arbitration award which required it to reshape its work force pursuant to a court order in an unrelated case due to past discrimination against women. *Id.* at 761. W.R. Grace and Co., in violation of the collective bargaining agreement, began to lay off senior male employees. *Id.* In its effort to overturn the arbitration award which prohibited the company from laying off company male employees in violation of the collective bargaining agreement, W.R. Grace and Co. argued that enforcement of the award was against public policy because it meant that it would be in contempt of the federal court's order requiring a more gender-balanced work force. *Id.* at 769.

This Court ultimately rejected W.R. Grace's argument that enforcement of the adverse arbitration award would require the company to violate the federal court's consent decree entered to remedy past discrimination against women, and thus violate the public policy which mandates compliance with court orders. *Id.* at 770. This Court was unsympathetic to this argument because it was W.R. Grace's own conduct which placed it in that undesirable position.

Despite the fact that this Court upheld the award, the Court noted in strong language that if the arbitrators'

award ". . . violates some explicit public policy, we are obligated to refrain from enforcing it." *Id.* at 766. This Court noted that the policy must be well-defined and specifically articulated, concluding that, "It is beyond question that obedience to judicial orders is an important policy." *Id.*

This Court expanded these principles with vigor and conviction in *Misco.* This Court in *Misco* applied the test of *W.R. Grace and Co.* to *Misco* in refusing to overturn an arbitration award on grounds that to do so would violate an alleged well-recognized public policy against the operation of dangerous machinery while under the influence of drugs. 484 U.S. at 42. This Court faulted the Court of Appeals for concluding that the enforcement of the award would violate this alleged public policy because the lower court did not review existing laws and case law to determine that there existed such a specifically articulated policy. *Id.*

This Court in *Misco,* while refusing to overturn the arbitration award on public policy grounds, reaffirmed the vitality of the "public policy doctrine" by specifically identifying its two legal underpinnings: (1) the common law notion that courts may refuse to enforce contracts that violate the law or a public policy; and (2) the public's right to have well-established public policy respected and honored even within the confines of a supposedly "private agreement" to arbitrate. 484 U.S. at 42. This Court's comments in *Misco* are instructive:

> A court's refusal to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy is a specific application of the more general doctrine,

> rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy. [Citations omitted.] That doctrine derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act, and is further justified by the observation that the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements. [Citations omitted.]

Id.

2. The Unrefuted Evidence Indicates Triton Committed Violations Of The Federal Securities Laws

In the instant case, there was unrefuted evidence of violations of federal securities laws, the Foreign Corrupt Practices Act, and California fraud laws based on the admissions of Triton employees and ex-employees. The genesis of all these violations emanates from the Calloway Report. (Appendix F.) This report was written by Michael A. Calloway, a high level executive in corporate internal audit from Triton's headquarters in Dallas, Texas. Triton dispatched Calloway to Indonesia to investigate the accounting methods used by Triton for its Indonesian operations, including the Enim Field Oil Project, which was the subject of the Triton/Nordell joint venture. Calloway's trip occurred in September 1989, well after Triton took control of the Project in October 1988. Calloway's

observations and recommendations are directed to Triton's upper management and are memorialized in the Calloway Report. (Appendix F.)

The Calloway Report is remarkable in its admissions of wrongdoing and thoroughly candid in its demands for corrective action. But Triton, instead of taking that corrective action and disclosing the lack of accounting controls and the payment of bribes to foreign officials in its registration statement as required under federal securities laws, ordered the destruction of the Calloway Report. Calloway admitted during his testimony that Triton's upper management had ordered that the original and all copies of his report be destroyed. (Appendix G, APP-55.) Calloway testified as follows:

> Q: [by Nordell's counsel]: What happened to the original of this document [the Calloway Report]?
>
> A: [by Calloway]: It was destroyed.
>
> Q: Who destroyed it?
>
> A: I did.
>
> Q: Why did you destroy it?
>
> A: It was distributed to the people. They were shown the report, after my boss, they read it, he said, 'Collect the copies and have them destroyed,' so I did.
>
> Q: Did he say why you want them all destroyed?
>
> A: No.
>
> (Parentheticals added for context.)

Id.

Astonishingly, the arbitrators assisted Triton in its cover-up by ordering that the Calloway Report, all of Calloway's testimony, and all documents and testimony relating to the Calloway Report, be sealed. In fact, the panel retained the only copies of the Calloway Report and the transcripts of Calloway's testimony and would not even provide copies to Nordell's counsel for use in the arbitration confirmation proceedings in federal court until the court ordered disclosure to Nordell's counsel after Nordell successfully litigated this issue against both Triton and the American Arbitration Association.

The strong action Triton took in an effort to prevent public disclosure of the Calloway Report is understandable, but the arbitrators' complicity in this posture is incomprehensible. At the very least, the arbitrators should have reported this information to the federal authorities such as the Securities and Exchange Commission ("SEC"), but instead the arbitrators assisted Triton in its efforts to prevent the authorities from obtaining this information.

Calloway reported that Indonesia was "a country of state supported corruption." (Appendix F, APP-43.) Calloway stated in his report that Triton was regularly engaged in "payoffs," *i.e.*, bribes, in Indonesia. (Appendix F, APP-43-48.) Most disturbing to Calloway was that Triton paid bribes to the Indonesian government auditors to "cook the books" on the Enim Field Oil Project. The Project had to be audited by the Indonesian government auditors to determine the royalties that Triton would have to pay to Pertamina, the government-owned oil company of Indonesia. In his report, Calloway wrote as follows:

> "What is worse, and this is extremely confidential, is that we paid the [Indonesian government] auditors in order to have their audit exceptions taken care of. Instead of the $600,000 of audit exceptions [Triton otherwise would have had], we paid them approximately $150,000 to $200,000 [to eliminate the exceptions]. This part is particularly bad to me. I had hoped that at least the Indonesian auditors were honest. But, I was told time and again that every Indonesian will steal from you."
>
> (Parentheticals added for context.)

(Appendix F, APP-44.)

Calloway in his testimony admitted the facts that constituted the bribes paid to the Indonesian state auditors to "take care of" the government audit, although he tried to temper during his testimony the remarks he had made previously in the Calloway Report about "payoffs" by testifying that he was "not sure" that he would call the payoffs "bribes." Nevertheless, he admitted the factual predicate for the bribes as follows:

> Q: [by Nordell's counsel]: In fact you [Triton] paid the Pertamina [Indonesian government] auditors $150,000 to $200,000 to take of, shall we say, exceptions to cost recovery items. Is that the truth?
>
> A: [by Calloway]: Is correct.
>
> * * *
>
> Q: Triton basically paid a one hundred and fifty to two hundred thousand dollars to Pertamina auditors to have them forget about it, if you will, $600,000 audit exceptions?

A: As I understood the situation, that is correct.

(Parentheticals added for context.)

Id.

Moreover, Calloway reported that the lack of internal accounting controls was so pervasive that he, as the chief of internal audit, could not distinguish a real transaction from one that was false for the Enim Oil Field Project in Indonesia. (Appendix F, APP-44.) Calloway described the situation in his report as follows:

> " . . . Unless you are the one on the scene at the time, it is very difficult, perhaps impossible, to tell a real transaction from one that has been faked for cost recovery purposes."

Id.

More alarmingly, Calloway never even ordered a fraud audit to address the issue. Undoubtedly, the fact that upper management had ordered his report destroyed influenced his thinking. Even though Calloway acknowledged that it was impossible for him as the chief of internal audit to distinguish a real transaction from a non-existent phantom transaction, he never ordered a fraud audit. (Appendix G, APP-60.)

Nor was this accounting fraud limited to "covering up" Triton's payment of bribes to the Indonesian government auditors. It extended to mundane payments Triton was required to make for the operation of the Project. J.M. McDonough, a Triton purchasing employee from Triton's headquarters in Dallas, made extensive equipment purchases for the Project in Indonesia. McDonough testified

that, after a telephone call he had with McAdoo of TII about a large oil rig purchase for the Project, he altered the purchase order. (ER 29 at 1605.) He testified as follows:

> Q: [by Nordell's counsel]: You said that's what you did. What did you, Mr. McDonough, do after the phone call?
>
> A: [by McDonough]: I arbitrarily jacked the price up on the equipment.
>
> Q: What physically did you do?
>
> A: Physically, I took the purchase order with the original price on it. I put a number beside it. I figured that we could – they could live with. I sent the purchase order with the number to McAdoo [a Triton employee]. I had discussed all this with our Mr. Ciavarra [a high level Triton executive] before we ever did it.
>
> (Parentheticals added for context.)

Id.

The testimony of Richard Poulton, the Price Waterhouse auditor and ex-TII employee who was forced by Triton to resign for his failure to countenance Triton's fraudulent accounting procedures, is even more damning. Poulton testified that Triton's operation in Indonesia was lacking in even the rudimentary audit controls. (Appendix H, APP-84.) Poulton testified as follows:

> Q: [by Nordell's counsel]: . . . In your opinion were any of these [accounting] problems exacerbated by what you saw as Triton's operations?

A: [by Poulton] In my opinion, yes, there were things that Triton, you know, had in their procedures that, you know, did lead to a further deterioration.

* * *

A: Why do you say that?

Q: Well, in terms of internal control it is very critical to the concept of a segregation of duties – I am going to place it first in terms of, you know, in the United States and then I will, you know, expand, you know, on how that translates to operations in Indonesia. Critical to management control and separation of duties is that the people who are responsible for contacting vendors and making commitments for the procurement of goods are not involved in verifying receipt leading to payment for goods. In the United States this would be a very, very serious internal control matter. In a country such as Indonesia where problems with incorrect payments being invoiced for goods not received is a very, very common problem. I considered their method of approving payments prior to independent confirmation of goods to be a gross violation of very, very basic internal control principles.

(Parentheticals added for context.)

Id.

Poulton was particularly concerned about Triton's bribes paid to Pertamina, i.e., Indonesian government, auditors for the audit of the Project. Other Triton employees regularly referred to this practice as "buying

the audit." Poulton specifically recalled one meeting when this issue was discussed and his shock at Triton's cavalier treatment of this grave matter. Poulton testified as follows:

> Q: [by Nordell's counsel]: Did you express those concerns at this meeting?
>
> A: [by Poulton]: I did express that concern and Mr. McClure stated that Triton had in the past bought the audit from Pertomina [sic] and that they would continue to do so to get this transaction approved by Pertomina [sic]. I have to say that I was shocked by that treatment. Having been a director of internal audit for a New York stock exchange company, in my mind, you know, discussing as a means to implement accounting policy – and I understood the word "buy the audit" to mean bribe Pertomina [sic] auditors. To me it represented an illegal transaction, the proposal of an illegal transaction.

(Appendix H, APP-93-94.)

Poulton subsequently was forced under pressure from Triton to resign for his refusal to participate in Triton's fraudulent accounting practices. Similarly, former Triton Chief Financial Officer, Jimmie Janacek, was terminated by Triton for refusing to participate in Triton's accounting fraud. Janacek sued Triton for wrongful termination of his employment and received a $124 million jury verdict against Triton. (Request for Judicial Notice, Exh. 1.)

3. Because Triton's Violations Of Federal Securities Laws Are Contrary To Well-Established Public Policy, This Court Should Refuse To Enforce The Arbitration Award

The above-described conduct constitutes an illegal bribe under the Foreign Corrupt Practices Act which is codified as 15 U.S.C. §§ 78dd-1 and 78dd-2. A violation of the Foreign Corrupt Practices Act is a criminal offense. 15 U.S.C. § 78dd-2(g).

These bribes are not exempted as facilitating payments allowable to secure routine governmental action. *See*, 15 U.S.C. § 78dd-2(b). The statute specifically defines "routine governmental action" as the securing of standard government paperwork such as licenses, visas and essential services such as telephone service and police protection. 15 U.S.C. § 78dd-2(h)(4)(A). Clearly, Triton used the bribes it paid to Indonesian government officials to obtain government approval of the audit of a complex business operation, i.e., the Enim Oil Field Project. Such an audit does not constitute "routine government action."

The concept of a bribe is broadly interpreted to encompass any payoff to a foreign official for purposes of procuring or retaining business. *Instituto Nacional De Comercializacion Agricola (Indeca) v. Continental Illinois National Bank and Trust Co.*, 576 F. Supp. 985, 990 (N.D. Ill. 1983). Triton's payment of $200,000 to the Indonesian government auditors to eliminate $600,000 worth of audit exceptions is a bribe designed to retain Triton's contract with Pertamina (the Indonesian owned and operated oil company) for the Enim Oil Field Project.

In addition, Triton's failure to disclose in its registration statement the bribes, the Calloway Report, the fraudulent accounting practices, and the Janacek lawsuit, constitute material omissions. These omissions are violations of Section 11 of the Securities Act of 1933 (15 U.S.C. § 77k) and Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)) because they are material to the financial condition of Triton's Indonesian operations. Both violations carry possible criminal penalties. *See*, 15 U.S.C. § 78ff(a) and 15 U.S.C. § 77x.

Finally, to the extent that these acts of bribery and fraudulent accounting impacted, and were directed to Triton's business partner in the Project, Nordell, they constituted a civil fraud in violation of California's fraud statutes. Cal. Civ. Code §§ 1572, 1573, 1709, and 1710.

It is clear that Triton's illegal conduct in the payment of bribes and its fraudulent accounting practices is against public policy. Thus, Triton's award cannot stand. The principle that a court will not enforce a contract (including an arbitration award) that violates public policy is well-ingrained in the jurisprudence of this Court. *See, Hurd v. Hodge*, 334 U.S. 24, 68 S. Ct. 847 (1948) (a court's final judgment enforcing racially restrictive real estate covenants cannot stand as violative of public policy); *McMullen v. Hoffman*, 174 U.S. 639, 19 S. Ct. 839 (1899) (a contract which encompassed bid-rigging and other fraudulent business practices is unenforceable as contrary to public policy).

B. It Is A Violation Of Public Policy For The Arbitration Panel To Provide Affirmative Relief To Triton Because Triton May Not Benefit From Its Own Wrongful Conduct

Based on Triton's admittedly fraudulent accounting practices, Triton and TII may not receive an arbitrators' award which would allow it to benefit from its own wrongful fraudulent conduct in violation of the "unclean hands doctrine." The doctrine is codified in Cal. Civ. Code § 3517 as follows:

> No one can take advantage of his own wrong.

The courts have used this doctrine to prevent a party from receiving affirmative relief from a court or tribunal when that party has been guilty of wrongful, fraudulent or immoral conduct relating to the matter which the court is considering. *Richman v. Bank of Perris*, 102 Cal. App. 71 (1929); *Buck v. Dahlgren*, 23 Cal. App. 3d 779, 788-89, 100 Cal. Rptr. 462 (1972).

The enforcement of Triton's award by this Court would violate the clear public policy enunciated in the unclean hands doctrine codified in Cal. Civ. Code. § 3517. *Misco*, 484 U.S. at 42. Where the enforcement of the award would violate public policy, the court is obligated to vacate the award. *Id.*

It is clear that Triton based its own damage calculations on this fraudulent accounting data and, incredibly, used Calloway as a witness to sponsor this data. Never did Triton "purify" this tainted accounting data by doing an independent fraud audit to confirm the validity of the

accounting data it used to present its own damage calculations.

Even more disturbing is the fact that the arbitrators invited a post hearing submission by Triton for damage calculations prepared by Calloway. (Appendix I.) Triton provided a response, which did not set forth the evidentiary foundation for any of its damage calculations but rather assumed the validity of its own fraud tainted financial data. (Appendix J.) Nordell provided a written response to Triton's post hearing submission, objecting to Triton's data as lacking in evidentiary foundation. (Appendix K.) Inexplicably, the panel refused to accept Nordell's responsive written submission and in essence struck it from the record. (Appendix L.)

This Court should refuse to condone Triton's fraud and illegal conduct and hence, should vacate the arbitrators' award. The arbitrators violated the public policy concept known as the unclean hands doctrine by providing TII and Triton with affirmative relief and the forfeiture remedy. Nordell filed an application for correction on these grounds, i.e., Triton's violation of the unclean hands doctrine, which the arbitrators rejected. (ER 115, Exh. GG at 76.) As such, the arbitrators' complete disregard of the public policy dictates of the clear-cut unclean hands doctrine should be examined by this Court. For that reason alone, this Court should grant this Petition.

CONCLUSION

For the reasons set forth herein, Nordell respectfully urges that the Court grant certiorari in this case. The decision of the Court of Appeals ignores the clear dictates set forth by this Court in *W.R. Grace and Co.* and *Misco* prohibiting the enforcement of arbitration awards which offend well-established public policy. Only this Court can revitalize public confidence in the arbitration process by reversing Triton's award, which at best ignores, and at worst condones, Triton's clear violations of federal securities laws and state fraud laws.

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Respectfully submitted,

BLECHER & COLLINS, P.C.
MAXWELL M. BLECHER
RALPH C. HOFER
[Counsel of Record]
611 West Sixth Street
Suite 2000
Los Angeles, California 90017
(213) 622-4222

Attorneys for Petitioner
Nordell International Resources, Ltd.